pay for said lot as above specified I will forfeit as liquidated damages for such breach of this contract and default of such payment, an amount equal to the full purchase price as above stipulated." As the court pointed out, where there is nothing to show that the parties meant actually to adjust the damages and that it was evidently inserted as a collateral security for the main object, it is a penalty and hence not enforceable. Other evidences of the operation of this rule may be found in building contracts, where if a building is not completed within a certain fixed time, the contractor agrees to forfeit a stipulated sum. Applying the rule, such contracts are seen clearly not to be enforceable [16] because if the contractor merely does not finish the last coat of paint he forfeits the entire sum as surely as though he fails to lay the foundation. This of course is clearly a penalty. In case of doubt the courts are inclined towards construing such stipulations to be a penalty,[17] on the ground that no formal words should be allowed to cloak a penalty. As said by Lord Holt:[18] "Where a sum of money whether in the name of a penalty or otherwise is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of that object is considered as the principal intent of the deed or contract, and the penalty only as accessory and, therefore only to secure the damages really incurred."

The true test on reason and principle would seem to be: Does the stipulated sum represent compensation for actual loss; if so, it may be upheld as stipulated damages. The gradual trend of the courts is to apply the rule stated above.[19]

RELIEF FROM ILLEGAL CONTRACTS.—The general rule governing the courts in cases where relief from illegal contracts is sought is expressed by the maxims *in pari delicto portior est conditio defendentis,* and *dolo malo non oritur actio.*[1] This doctrine is deeply rooted in the law, although it is subject to certain limitations which have been recognized from the earliest times.[2] Its reason is founded solely on general principles of policy; the parties deserve no relief at the hands of the law because they have acted illegally and the discouragement of such practices in the future is purposed by ignoring such illegal claims. Lord Mansfield thus states the principle: "If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no

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[16] Chicago, etc. *v.* U. S., *supra.*
[17] Davis *v.* Gillett, 52 N. H. 126.
[18] Note to Barton *v.* Glover, Holt's N. P. Rep. 43.
[19] Lee, etc. *v.* Overstreet's Adm'r, 44 Ga. 508.
[1] Taylor *v.* Chester, L. R. 4 Q. B. (1869) 309; Chapman *v.* Haley, 117 Ky. 1004, 80 S. W. 190; Hutchins *v.* Weldin, 114 Ind. 80, 15 N. E. 804; Pullman Co. *v.* Central Trans. Co., 171 U. S. 138; Harriman *v.* Northern Securities Co., 197 U. S. 244.
[2] Everett *v.* Williams, 9 L. Quar. Rev. 197.

right to be assisted. It is upon this ground the court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff." [3]

But in applying these maxims the courts are confronted by two questions which give rise to certain universally noted exceptions to the rule.[4] First, are the parties *in pari delicto*? Second, since the underlying principle of the doctrine is the public interest, will not such an end be better attained by granting the relief sought?

When the parties are in fault but not equally so, public policy is not the sole subject for consideration; the rights of the parties are to be taken into account. So where there has been fraud, undue influence, oppression or duress on the part of the defendant, although both the parties have participated in an unlawful transaction, the illegality of the agreement may to a certain extent be disregarded. It is looked upon as a circumstance created by the more guilty party without which the unlawful contract would never have originated. The fraudulent person is responsible for the illegal contract, and hence should not be allowed to hide behind it as a defense when an action is brought against him; the complainant is the victim out of whom circumstances, or the illegal practices of the defendant, playing upon his weakness has made a tool.[5] Often the very object of the defendant in these cases has been to shield his turpitude and accomplish his purpose behind the rule *in pari delicto,* etc. Indeed, as has been suggested, the courts in such instances accord justice and serve the general public interest better by applying *nullus commodum capere potest de injuria sua propria.* In a late case an organized band of gamblers induced persons to bet upon foot races by falsely representing to these victims that the races were so fixed up that a certain runner was sure to win. In reality, however, it was so arranged that the runner represented to win was to lose, and the misguided miscreant was defrauded. The court in voicing the trend of modern authority allowed a recovery by the victim, recognizing the parties not in equal wrong when a "gang" organized for an illegal practice inveigles single individuals into a fake scheme for defrauding others.[6] It has long been sug-

[3] Holman *v.* Johnson, 1 Cowp. 341.

[4] See Pomeroy, Eq. Jur., §§ 403, 941; Story, Eq. Jur., § 298.

[5] Reynell *v.* Sprye, 1 De G. M. & G. 696; Porter *v.* Jones, 6 Cold. (Tenn.) 313; Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433; Duvall *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, probably carrying this limitation to the *in pari delicto* doctrine as far as any decided case. In that case there was no actual undue influence but money paid under a marriage brokage contract was recovered upon the grounds of constructive fraud in the very existence of the agency.

[6] Hobbs *v.* Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906; Stewart *v.* Wright (C. C. A.), 147 Fed. 321. The tendency of the courts is well shown by the fact that in Abbe *v.* Marr, 14 Cal. 210, an earlier case on all fours with Hobbs *v.* Boatwright, it was held there could be no recovery. The court said in the earlier case: "When the plaintiff asserts his own turpitude in this way he sends his case out of court."

gested that a point for debate is how far illegal, if at all, is the complainant's act in that, due to the fraud of the other parties, the object of the contract is impossible of ever materializing.[7] In the recent case of *Gilchrist* v. *Hatch* (Ind.), 106 N. E. 694, the plaintiff conveyed land to the defendant as consideration under a contract whereby the defendant, an officer of a corporation, was to deliver certain shares of the stock of the corporation, and procure for him the position of corporation counsel. The latter part of the consideration was illegal. But regardless of this illegality in the contract the deed was set aside as a fraudulent conveyance.[8]

Closely allied to the cases where fraud and undue influence take the parties out of the operation of the *in pari delicto* doctrine are those where there exists a fiduciary relation. Here the complainant has a right to rely upon the defendant and this fact makes him the less guilty. Where a trust is abused, even though that which brings on the abuse contemplate illegality in the confidential relations, the courts will to a certain extent look beyond this circumstance and give due consideration to the position in which the complainant party stood with respect to the defendant.[9]

A class of cases in which the authorities seem in accord that the parties are not in equal wrong, arises where the contract is illegal by reason of a law made for the protection of the one against the acts of the other.[10] To allow recovery would appear the proper holding where a contract violates a law of this nature, for otherwise the purpose would be defeated; since these laws are founded on the assumption that the parties are not on an equal footing, to go on this assumption in granting relief to those

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[7] In Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887, there was allowed recovery of money paid under a contract to compound a felony which in fact never existed, the court saying: "When conduct susceptible of two constructions is proven, intent often determines its criminality, but intent not carried out by an act or which is impossible of execution by an act, is not punishable. The law takes no cognizance of an intent existing only in the mind, nor does it impose as a penalty for such an intent, immunity to one who has plundered one guilty of it."

[8] In spite of the stipulation illegally to obtain for the plaintiff the position of corporation counsel, the court said: "It is not the policy of the law to place restrictions on legitimate business dealings or to relieve a party from his own mistakes of judgment, but it is a matter of common knowledge that fraudulent stock selling schemes are a favorite resort with unscrupulous promoters who prey on the ignorant and credulous, and form a parasitic element within society against whom the latter is entitled to protection."

[9] Osborne *v.* Williams, 18 Ves. 379; Harper *v.* Harper, 85 Ky. 160, 7 Am. St. Rep. 583; Melbye *v.* Melbye, 15 Wash. 648, 47 Pac. 16; Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221.

[10] Browning *v.* Morris, 2 Cowp. 790; Thomas *v.* Richmond, 12 Wall. 349. Statutes which declare usurious contracts null and void are a prominent example of laws intended for the protection of one party against the other. Ferguson *v.* Sutphen, 8 Ill. 547.

whom it would protect seems to be a proper extension of this underlying principle in construing them.

Granted then that the parties are *in pari delicto*, the courts are agreed that where a wise regard for the public welfare is better subserved by punishment of the defendant than by a denial of relief to the complaining party, a recovery should be allowed. This principle has weight in most of the cases where the rule is waived because the parties are not equally at fault, but frequently the sole ground for granting the relief sought is that public policy demands it.[11] The clearest examples of courts being called upon to rest their decision on this ground are cases in which a *locus penitentiæ* remains. Then it best comports with the general welfare to arrest the illegal proceeding before it is consummated.[12]

It will be seen that while the general rule is that *ex dolo malo non oritur actio*, it is adhered to only in so far as it promotes the public good and the trend of the courts is to look to the reason rather than the rule, so that it is much less frequently applicable now than at the time the older cases were decided.

Summarizing, the limitations upon this doctrine fall into the following classification: (1) the parties though apparently so, are not *in pari delicto* because there is (a) fraud, oppression or undue influence on the part of the defendant, (b) a fiduciary relation exists between them, or (c) the law which makes the agreement unlawful was intended for the protection of the party asking relief. (2) The public interest would be more effectively promoted by granting relief than refusing to hear the complaint.

PROCEEDINGS IN BANKRUPTCY AGAINST DORMANT OR SECRET PARTNERS.—In cases where partnerships are being administered in bankruptcy, an anomalous condition exists by reason of the dual capacity of a member of a partnership. The administration follows peculiar rules because, while a partnership is an association of individuals by the general law, in bankruptcy for some purposes it is

[11] In Rideout *v.* Mars, 99 Miss. 199, 54 South. 801, a statute forbade any discrimination in life insurance premiums. A life insurance agent issued a policy and with agreement with the insured accepted only part of the required premium in full satisfaction. The administrator of the agent was allowed to recover of the policy holder the balance of the premium. The court said: "The general good permits the estate of the decedent to receive something he was not morally entitled to rather than the appellee shall have insurance at a less premium than the uniform rate."

[12] Taylor *v.* Bowers, L. R. 1 Q. B. 291; Mueller *v.* Cigar Co., 89 Neb. 438, 131 N. W. 923, 34 L. R. A. (N. S.) 573. So in gambling transactions the cases agree that the money may be recovered from the stakeholder before payment by him after notice not to pay, although the event upon which it was staked has occurred. Diggs *v.* Higgle, 46 L. J. Ex. 721; Moore *v.* Trippe, 20 N. J. L. 263; Fisher *v.* Hildreth, 117 Mass. 558.